mother saying this one, ''There is so much bad in the best of us, and so much good in the worst of us, it ill-behooves any of us to speak badly about the rest of us.''

Maybe here on the Senate floor, when we get a little carried away sometimes back and forth, it gets very personal—as it has gotten too personal recently. Maybe we need to remember that. Here, where the business of all the people, the melding of ideas is supposed to take place, where the business of all the people is taking place on this floor, our conduct has to contribute to that, not detract from it.

Mr. President, I yield the floor.

Several Senators addressed the Chair.

The PRESIDING OFFICER (Mr. ABRAHAM). Under the previous order, the Senator from Alaska is recognized.

DIRECTING THE SENATE LEGAL COUNSEL TO BRING A CIVIL ACTION

The Senate continued with the consideration of the resolution.

Mr. MURKOWSKI. Mr. President, this is a difficult issue for all Members of this body relative to the business at hand and the necessity of proceeding with the subpoena. I suggest that probably not since the days of the Watergate constitutional confrontation has this body considered an action that is as serious as the one that we are considering here today.

It is the feeling of this Senator from Alaska that this day did not have to come, but it is here. The subpoena was not something that was inevitable. But we are here today for one reason and only one reason, and that is because we have a situation where our President refuses to cooperate with this Senate investigation and turn over the notes that could be very crucial to the public's understanding of the Whitewater scandal.

The President and the administration seem to be hiding behind the shield of attorney-client privilege. At the same time, one can see through the raising of the specter of executive privilege. You cannot have it both ways. It is one or the other.

The White House claims that it will turn over these notes on one hand, and then lays down conditions, conditions that are so totally unreasonable that what the President is really saying is that he will not turn over the notes in the sense of full disclosure.

It is interesting, because from the day these hearings began, in July of 1994, my colleague from New York, Senator D'AMATO, and I made several appeals on this floor concerning various issues, the statute of limitations and others, relative to questions that had been raised to which were not forthcoming responsible answers. So, back in July of 1994, the White House, at that time, professed the President's desire to cooperate, cooperate with the formation of the special committee of which I am a member. The President said that he, too, was interested in getting the facts—all the facts out on Whitewater.

At nearly every turn of the committee's deliberations the White House has tried to make these deliberations more difficult, more prolonged, refuses to answer more questions, and seems to have a shorter memory. What this committee is charged with doing, under the able leadership of Senator D'AMATO, is to hold the President to his promise to cooperate with this committee. One has to ask if the administration has an ulterior motive, or other reason, for not cooperating? At all times it seems what the President professes is not necessarily what the President ultimately means. I do not have to go into the issue of balancing the budget with OMB's figures or CBO figures—that's an argument for another time. But I think the American public is now aware that what the President professes is not necessarily what the President means.

We see this pattern repeated again and again and again. That is part of the problem here today, Mr. President. The American public has seen this pattern over and over, and the concern now is that the President's tactics have almost conditioned the public for a norm. The public has come to expect this from the administration as a consequence because of this repeated inconsistency, and has become used to it. That is very dangerous. At times it seems that, because of the President's track record, the public's expectations and standards for the President are lower.

I think we agree that we have an obligation to hold the President accountable. The President must be held to his promises. Today, we must hold the President accountable by preventing him and his administration from withholding information from the American public, information that the public is entitled to know. We have to put an end to the stalling and to the delay tactics that have become so familiar to the Special Whitewater Committee. Even the media is beginning to pick up on it. You can hardly find a newspaper article today where the term ''stonewalling'' and ''the President'' do not appear in tandem.

These delay tactics that this committee has endured, which I know many of my colleagues have elaborated at great length on today, can only lead to one conclusion: The administration has led a deliberate and systematic effort to cover up. And cover up what? What is there to hide? Why is the administration fighting us and being so reluctant to turn this information over?

I want to bottom line the seriousness of the vote that we are going to be taking at some point in time. Chairman D'AMATO outlined what our investigation is all about. The investigation of Madison Guaranty and Whitewater have led to felony convictions and resignations. Think about that. That is pretty serious, Mr. President. The investigation so far has led to felony convictions and resignations, and there are those that just pooh-pooh this matter and simply say, well, we have not really learned anything. We have some convictions. We have some resignations.

The McDougals, the owners of Madison Guaranty, were involved in numerous improper loans and land deals which led to the loss of tens of millions of taxpayer dollars. Witnesses testified before the committee that the Whitewater Corp., which is half owned by the Clintons and half owned by the McDougals, had improperly ''kited'' funds.

That is serious, Mr. President. That is very serious. I spent 25 years in the banking business as the chief executive officer of a statewide organization. I know what cease and desist orders mean relative to mandates by the controller of currency, the Federal Deposit Insurance Corporation.

What was going on in Madison Guaranty was clearly illegal. There is a story that has yet to be told relative to the obligations of the various agencies that examined that financial institution. I am convinced that those examiners were doing a conscientious job relative to the reporting of the true condition of that organization, and they were reporting up to their level. And for reasons that have yet to be made clear to the committee and made public, no action was taken by the administrators associated with the insurance of the depositors with Madison Guaranty.

So, clearly, there were pressures brought to bear on the top regulators by political influences that surrounded Madison Guaranty not to take action relative to the illegal activities that were associated with Madison Guaranty, whether it be the kiting of the checks or the manner in which clearly Madison Guaranty, under the McDougals, was being operated almost for the benefit of a few selected individuals who were receiving favorable loans at favorable interest rates. The loans were rewritten to bring the due dates current. The interest was simply added to the principal to bring those loans current.

These are all flagrant violations that suggest, if you will, not just inappropriate or improper handling, but an illegal activity of a very, very serious nature subject to formal charges by the banking authorities and the regulators. But we did not see that, Mr. President. That did not occur as the true condition of Madison Guaranty become known to the regulators.

I think that there is a story yet to be told. I hope that we find those that are willing to come forth and explain to the committee why appropriate action was not taken when indeed Madison Guaranty was running amuck, running almost as a personal extension of the McDougals and some of their friends.

We have been attempting to get information in the committee. The committee has been hindered from obtaining information because of numerous delays, stonewalling tactics. One of the things that is very, very hard for this Senator to accept is the convenient loss of memory.

Susan Thomases, the First Lady's friend and adviser, responded, ''I do not remember'' over 70 times to even the most basic questions asked by this committee. These were not everyday events; these were significant events from very, very bright people who were associated with a responsibility to perform. And to suggest that they cannot remember, over 70 times in testimony, significant events is pretty hard to accept by the committee.

Maggie Williams, the First Lady's chief of staff, a very, very bright, articulate person, told the committee over 140 times that she did not recall. Once in a while, OK. I cannot recall every specific event that happened last year, but in regard to important matters, I can tell you what happened last year. And I can tell that certain events stand out in one's memory, Mr. President. For example, I have been deposed by attorneys relative to business activities of the organizations that I have run, and those proceedings, those types of proceedings, do stand out in your memory. It may be very convenient to say I do not recall, but to do it 140 times to the committee in response to some very, very basic questions about some dramatic events, events that some of the witnesses themselves documented, is simply pretty hard to accept.

During the week of the committee's investigation we learned now of the possibility of more cover up in the White House, and we have discovered that files are missing.

Mrs. Clinton's law firm represented Madison Guaranty against the State and Federal investigations that were occurring. Mrs. Clinton professed that she did ''very minimal work'' on the Madison Guaranty case. On Monday, the committee learned that the First Lady's statement may need to be questioned.

The personal notes of the close friend and adviser to the First Lady, Susan Thomases, were disclosed in the committee and revealed the following:

One, that Mrs. Clinton actually had numerous conferences, which have been documented, with the Madison Guaranty officials.

Two, that Mrs. Clinton made several efforts to keep the failing thrift afloat. Obviously, that was her job as counsel representing the Rose law firm. There is nothing wrong with that. But the fact is, we are not able to get the documentation to just how far those efforts went.

And lastly, that Mrs. Clinton was solely responsible for all the law firm's bills for the Madison case. The accuracy of that should be able to be ascertained relatively easily by documentation, but we do not have the documentation.

Earlier this month, Webster Hubbell, former Assistant Attorney General and former Rose law firm partner, who is now serving 21 months in Federal prison, also testified that Mrs. Clinton did little work on the Madison Guaranty case. However, the committee was able to produce billing records showing that Mrs. Clinton billed the Madison account for more than $6,000.

Again, I would remind my colleagues that the suggestion that this matter is not really very important, that nothing has been proven, Webster Hubbell would contend otherwise. He is serving 21 months in Federal prison relative to his role. And again, he was former Attorney General and former Rose law firm partner.

What is all this concern about? Why should the committee or the Senate or especially the American people be concerned about Madison Guaranty and Whitewater? Because, Mr. President, when Madison Guaranty ultimately failed, the American taxpayer picked up the cost, which was somewhere between $47 million and $60 million. The scam that went on at Madison was underwritten by the U.S. taxpayers.

We know that Mrs. Clinton had involvement to some extent through the Rose law firm in some of the activities of Madison. And I am not suggesting that those were inappropriate. Why can we not find out? Why do they not tell us? What are they hiding? As I said earlier, Mrs. Clinton billed over $6,000 to the Madison Guaranty account. According to the Rose law firm's accounting records, Mrs. Clinton did perhaps more work on Madison than anyone at her firm except one junior associate. Now everything that the committee learned may be just the tip of the iceberg because the Rose law firm claims that its billing files that recorded Madison activity from 1983 to 1986 are missing.

Let me repeat that, Mr. President. The Rose law firm now claims that its billing files that recorded Madison activity from 1983 to 1986 are missing. Well, it sounds more like ''I don't remember'' 70 times or ''I don't recall'' 140 times. And here is a sophisticated law firm with a long, long tenure, a respected law firm. There are a number of lawyers in this body, and I think they are all familiar with the meticulous process of billing. We always joke about the lawyer: Start talking to the lawyer and the clock starts. If you have ever received a billing from a lawyer, you have some idea how meticulous they are. They do not forget very much. They are trained to do that. The young attorneys bill out so much an hour, and they are expected to bill out so much a day. I have a daughter who occasionally reminds me of that as a young lawyer. But nevertheless to suggest that these are now missing from 1983 to 1986 is incredible.

I am reminded here of a reference that was made in the New York Post today. And this may or may not be pertinent, but it is certainly suggestive. It says, ''A Rose law firm clerk said he was told to shred documents in February of 1994 shortly after a Whitewater special prosecutor was appointed.''

As a consequence, Mr. President, the files contain information of just how involved perhaps the First Lady might be in the Madison Guaranty issue. The files could provide the committee with details of who contacted whom and what was discussed about Madison. It is rather curious to me that we do not have information from the RTC, Resolution Trust Corporation, which took over from the organization when it eventually failed. Upon such a takeover, there is inevitably a series of events that must occur. Madison was taken over by an organization, and then that organization failed and the RTC must have ultimately taken control over all the Madison records.

Now, those records should contain billing statements that were sent from the Rose law firm to Madison Guaranty. They might not be as specific as the Rose law firm's own records that would document specific topics and the details of the legal representation, however, the RTC records might be able to shed some light on the amount that the firm billed, the amount of time spent on the case, and may reference certain specific subject matters. I suggest that this might be an avenue that the committee investigates. It would seem to me it would be appropriate to make a determination whether or not the RTC has those records from Madison Guaranty and, if not, then attempt to determine what happened to the records. I think this could shed some light on determining how much the Rose law firm was reimbursed for its representation of Madison Guaranty.

Now, Susan Thomases' own notes appear to contradict the sworn testimony of Mrs. Clinton in an affidavit of 1994 in which she said that she had little or no involvement in Madison.

Let us find out. Come on up with the evidence. Come up with the records. Yet, when we attempt to get the evidence, the Rose law firm says their records are missing from 1983 to 1986. Were those shredded? The Rose law firm, I think, owes the committee an explanation. Thomases' notes show that Mrs. Clinton had numerous conversations with Mr. McDougal, the Madison Guaranty's President, about a preferred stock plan and brokerage deals that the thrift was proposing to State regulators to keep Madison in business.

The only way to find out the extent that Mrs. Clinton was involved is to review the law firm's records. But as I have said before, these files seem to have mysteriously vanished. Apparently the files were removed—perhaps by Webster Hubbell. We believe that the files may have been stored in his garage for a period of time. No one

seems to have any accurate knowledge of where the files are now. So to suggest that there is nothing here that bears examination, that there is nothing here that should not be brought before the public, I think, is an injustice to the committee members and those who have worked so hard to bring the facts forward.

I am personally, as a member of the committee, tired of the withholding tactics. I am tired of the stonewalling, tired of the excuses, ''I don't recall,'' ''I can't remember.'' I think we are at a crucial point now, a point in which this body can and should make the White House accountable. The committee's request for William Kennedy's notes is not unreasonable, Mr. President. The meeting that occurred between the President's private attorneys and the Government attorneys goes to the very heart of our investigation, an investigation to determine whether the White House misused official information. So I regret that the events have come to this extent today, to the vote that we are going to be taking at some time. However, it is the White House that forces the hand of this body to act. And I would again encourage the President to reconsider and come forthwith the information that has been asked by the committee and keep his promise to fully disclose information. I believe that the American public has a right to know. And it is certainly responsible for this committee to make such a request and initiate such action if that material is not forthcoming.

Mr. President, I ask for only one other item to be included in the RECORD, and that is a recap of the fees from Madison Guaranty Savings & Loan. And it is January, 1985. It identifies specific billings. It does not have a total on it for services rendered, but that can be ascertained by anyone looking at it.

I ask unanimous consent that that be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

RECAP OF FEES FROM MADISON GUARANTY SAVING & LOAN—FINAL RECAP

1983: None		
1984: None		
1985: January—None		
Feb./Mar./April/1985: None		
May 1985:		
Baledge	Madison Guaranty	$82.50
Massey	do	695.50
S. Grimes	do	260.00
Clinton	do	840.00
June 1985:		
Clinton	Madison Guaranty	60.00
Massey	Madison Guaranty/stock offering.	186.00
Massey	do	819.00
July 1985:		
D. Thomas	Madison Guaranty/Stock	90.00
July 1985:		
Giroir	do	55.00
Massey	do	1,391.00
Law Clerks	do	210.00
Clinton	do	144.00
Aug/Sept/Oct. 1985: None		
Nov. 1985:		
Thrash	Madison Guaranty/IDC	550.00
Thrash	do	283.50

RECAP OF FEES FROM MADISON GUARANTY SAVING & LOAN—FINAL RECAP—Continued

Thrash	do	355.50
Speed	do	32.50
Massey	do	552.50
Dec. 1985:		
Gary Garrett	Madison Guaranty/Stock Offering.	85.00
Giroir	do	100.00
Giroir	do	225.00
Massey	do	555.00
Massey	do	437.00
Massey	do	234.00
Clinton	do	88.00
Clinton	Madison Guaranty	232.50
Donovan	Madison Guaranty/Stock Offering.	90.00
1986: January 1986:		
Donovan	Madison Guaranty/Stock Offering.	468.75
Dave Thomas	do	262.50
Massey	do	952.50
Massey	Madison Guaranty/Limited Partnership.	165.00
S. Grimes	Madison Guaranty/Stock Offering.	60.00
Clinton	Madison Guaranty/Stock Offering and IDC.	2,731.25
Clinton	Madison Guaranty/Limited Partnership.	62.50
Clinton	Madison Guaranty/Stock Offering.	802.50
March 1986:		
Donovan	Madison Guaranty/IDC Stock offering.	825.00
B. Arnold	Madison Guaranty/Stock Offering.	80.00
April 1986:		
B.Arnold	Madison Guaranty/Stock Offering.	236.00
Donovan	do	318.75
Clinton	do	12.50
Clinton	do	262.50
May 1986:		
Clinton	Madison Guaranty	82.88
Clinton	Madison Guaranty/Babcock	1,050.00
Clinton	Madison Guaranty/IDC	70.00
Clinton	Madison Guaranty/General	197.12
Massey	do	112.50
B.Arnold	Madison Guaranty/IDC	48.00
July 1986:		
Clinton	Madison Guaranty/General	56.00
Clinton	Madison Guaranty/Babcock	308.00
October 1986: Clinton	Madison Guaranty/Babcock Loan.	84.00
1987: September 1987: Clinton.	Madison Guaranty/General	500.00

Mr. MURKOWSKI. I thank the Chair and I yield the floor.

Mr. BOND addressed the Chair.

The PRESIDING OFFICER. The Senator from Missouri.

Mr. BOND. Mr. President, I thank the Chair. I also commend our distinguished chairman of the Banking Committee, of the special Whitewater committee, for the good work that he has done.

Mr. President, we are here today because the Senate special Whitewater committee has finally reached the point where we have to say enough is enough. In our efforts over the past year to take testimony, gather documents, collect phone records, review handwritten notes, we found that, rather than cooperation and responsiveness, we have been met with a pattern of delay, obstruction and obfuscation.

After spending months trying to get access to various documents and phone records the old-fashioned way—we requested them—we discovered that a wide variety of records were being withheld. So we were forced to threaten to issue subpoenas.

This started a trickle of information. Usually the information arrived either late the evening before or the morning of the hearing.

But then we realized we were not receiving the documents to which the committee was entitled, so the chairman moved to actually issue subpoenas for anything and everything. In fact, after subpoenas were issued, surprise, surprise, documents and phone records began coming in, records that previously could not be found or could not be accessed.

On top of the resistance to releasing documents and the long delays in releasing phone records, we have also had some amazing instances of not only lapse of memory, but in one instance a witness, April Breslaw, said she was not able to identify her own voice on tape. To anybody who has not done so, if you want to witness a truly amazing discussion, you should read the transcript where Chairman D'AMATO asked Ms. Breslaw if she was the one that was actually on the tape. Ms. Breslaw said that the quality of the tape was not great, she was not sure that she was the one on the tape, and she did not know what to think.

Mr. President, we have seen some truly remarkable things. Months ago we had a witness who claimed that he lied to his diary, another witness who cannot remember his own notes.

But the strategy, I think, of obfuscation and obstruction has been taken to an art form in the testimony of Susan Thomases, the First Lady's close friend and associate. Over and over we heard Mrs. Thomases tell the committee that she ''did not recall,'' had ''no specific recollection,'' she had ''no personal knowledge'' of various events and phone calls surrounding the search of Vince Foster's office, the removal of documents from his office, the transfer of documents to a closet in the White House residence, and the discovery of the so-called suicide note.

Yet, after much digging and digging and a dribble and drabble, and a bit here and a bit there, phone records, we found that in fact she was omnipresent on the telephone lines of the White House during the critical times in question and she was calling the people who were directly involved. But obviously a minor matter like that a potential major investigation of the suicide of a White House aide, she could not remember what actually went on.

I believe today's Washington Post noted—or yesterday's Washington Post noted—that ''Thomases failed to recall virtually all the events Republicans question her about, and for the first time since this round of hearings began in August, Democrats dropped their defense of an administration witness. . .''

Mr. President, that is what we have been facing throughout this investigation—fact by fact, record by record, note by note, and document by document, we have been dragging the truth out of the administration and its associates, little by little.

If anybody had any question as to whether there may be something to hide, if you simply look at the pattern of delay, and refusal and dragging of

feet, it should become obvious that there is a concerted effort by the White House not to give all the information they have. Everyone should understand this has been the underlying current of Whitewater since the beginning.

The initial stories of this administration at nearly every step of the way have proven to be incomplete, inaccurate, or just plain untrue. It is only after pressure from Congress and the media that the truth, slowly, slowly, slowly trickles out. And we do not have it all yet.

We come to the infamous Kennedy notes. This time they cannot claim that they do not remember or cannot recall. They cannot say the records cannot be found by the phone company. They cannot claim they are not sure if it is their voice on the tape. They cannot claim they cannot find the files or the billing records are missing.

So what is left? They now claim that the notes made by a White House counsel, an official of the Government, of a meeting to discuss the Whitewater, Madison financial and legal activities, where there is significant allegations of wrongdoing which involve violations of Governmental laws and which involve the exposure of the Federal insurance trust funds, taxpayer trust funds, to private claims, they say meetings between a Government official, a White House counsel and a private attorney should not be released because they would violate the attorney-client privilege.

The President has said he is standing on principle to defend his rights as a private citizen to have meetings with his lawyers. Well, there is no question the President has a right to have a private meeting with his private counsel. But if you read the Op-Ed article in today's Wall Street Journal by Joseph diGenova, he goes through instance after instance of congressional investigation where the various privileges were held by the other party when they were in power and in charge of the investigation not to be applicable to congressional investigations.

Let us take a moment to talk about the principle which the President is defending. We have to remember that during 1993, the investigative wheels were in motion in three different Federal agencies, all pointing a finger at some activities that involved the top political elite, the political infrastructure of Arkansas.

The RTC, the agency investigating the S&L failures, was looking into the activities of Madison Guaranty, specifically in the misappropriation of a $260,000 loan by now-Arkansas Governor Jim Guy Tucker, the embezzlement and conspiracy by bank owner Jim McDougal, and a loan illegally diverted to the Clinton 1984 reelection campaign. The Small Business Administration was working putting together a criminal case against David Hale and Capital Management Services.

In this case we find Mr. Hale accusing the President of pressuring him to make an illegal loan to Jim McDougal, which eventually leads to Mr. Hale's conviction and the indictment of the current Governor of Arkansas. The Little Rock U.S. attorneys' office was in possession of an earlier criminal referral on Madison Guaranty in which massive check kiting was alleged.

Mr. President, while all the investigative work was going on, political appointees of the President at the Department of the Treasury were briefed in late September 1993 about the contents of the RTC's criminal referrals I just briefly described.

Unfortunately, instead of holding this information close, handling it as responsible governmental officials should handle the very sensitive, nonpublic information relating to a potential criminal investigation and/or action to be pursued by the Federal Government, the political appointees, Jean Hanson and Roger Altman, made the decision to tell the White House about the investigations. Then on September 29, 1993, Jean Hanson briefed then-White House counsel Bernie Nussbaum.

One of the key facts which we discovered during our earlier hearings was that while Mrs. Hanson clearly had the details of the referrals and discussed them with the White House, she had been told by the RTC, specifically Mr. Roelle, that while the Clintons were not targets of the investigation, ''* * * the language of that referral could lead to the conclusion that if additional work were done [that is, further investigative work] the President and Mrs. Clinton might possibly be more than just witnesses.''

That, Mr. President, is from the deposition of Jean Hanson, given to the inspector general of the RTC.

And, of course, in October 1993, the possibility of further investigative work being done by the U.S. Attorney for the FBI was not a closed question. As we now know, the U.S. attorney in Little Rock, Paula Casey, is a Clinton appointee and while she declined to do any further investigative work on the first referral, had just received the second and had not at that time recused herself.

Which brings us to the November 5, 1993 meeting between the Clintons' attorneys. Again, as we now know—and it has taken us a long time to get all of these details, even to find out about the November 5 meeting—when several Federal agencies were investigating the activities of Jim McDougal, Jim Guy Tucker and David Hale, the investigators have indicated that if more investigation was done, it is possible that the Clintons would become more than just witnesses.

Mr. President, we ought to add here, also from what we have now learned, it is or should be an open question as to whether there is any complicity of the lawyers who were representing the participants in the shady transactions which resulted in losses to Federal insurance funds. As a general proposition, an attorney friend of mine who has worked on a number of these cases says that where there is wrongdoing of a consistent pattern by a federally insured institution, usually the law firm knows about it or may possibly be involved in it. There is a real question as to what involvement a law firm representing an illegal scam-ridden operation has in the criminal activity.

In this instance, obviously, Jim McDougal used Madison Guaranty, the savings and loan, as his piggy bank and did many things with it. At the time he was doing that, the Rose law firm was representing Madison Guaranty, and the partner in charge was Mrs. Clinton.

My colleague from Alaska has raised the question about what happened to the files. Mr. President, that is a very important matter to consider, because I have worked in law firms, and you cannot walk in and take the files out of a law firm. You cannot go in and clean out the files. How did the original files from the Rose law firm wind up in the hands of political allies of the Clintons here in Washington? It would seem to me that when the RTC took over Madison Guaranty, they became the client and had the right to the files at the law firm representing the taken-over institution. Did they give their approval to removing those files? That is a question that bears further investigation.

But let us go back to the specific instance of November 5. According to David Kendall's memo which he sent to the committee, he said that we can assume, just for the purposes of this discussion, that every bit of information possessed by the participants was discussed at the meeting. He said, ''Go ahead and assume it, as you make this decision.'' He did not say it conclusively. We don't have the notes. But that means for the purposes of this question of whether we ought to compel the production of the notes, we can assume that not only was the Clintons' private lawyer told about the details of the case by Mr. Nussbaum and Mr. Eggleston, he could also have been told that ''if further investigative work'' were done his client's status could possibly shift from witness to something else, to something more serious.

This is a question that has bothered me throughout the investigation of what went on at Whitewater.

Mr. President, I had a not-too-pleasant discussion with Mr. Nussbaum the first time he came before the committee because I did not feel he was representing the people of the United States as White House counsel should. I asked him if he had taken the time to advise and instruct the other people in the White House who had come in possession of this vital nonpublic information that could be used, if it were to get into the hands of those who were potential targets of the investigation, to prepare their defense, perhaps even to change or get rid of evidence to prepare themselves to prevent prosecution or active pursuit by the Government of its rights.

Mr. Nussbaum told me that it was totally, totally unrealistic. He said: These people—I don't have to tell them that you shouldn't misuse inside information or nonpublic information you're getting—these people knew their responsibilities, knew their roles. I didn't have to go around telling these people not to do that and, indeed, Senator, with all respect—I realize you feel strongly about this, too—with all respect, Senator, there is not a single shred of evidence that anybody misused this information in any way. Not a single shred of evidence that documents were destroyed, people tipped off.

Mr. President, obviously, when he said there is not a shred of evidence, I pointed out to him that was precisely what we were concerned about. We were concerned about the reports of the former nonlawyer, nonlegal intern, runner or clerk in the Rose law firm who talked about shredding documents. That is why we are concerned about the broader picture.

But let me return to the President's statement that he was withholding the notes of the meeting on principle. Is he saying he believes it is his right for Government attorneys, who by virtue of their position, come into possession of confidential information, in this case information about an investigation into the Clintons' business partner in Whitewater development, an investigation about Mrs. Clinton's client, the law firm, the Rose law firm, about his Arkansas political allies and about his own 1984 campaign, to have this information transferred to his own attorney when it may directly involve himself, his wife, their legal liabilities and the legal liabilities of their political allies?

Is he saying, as a President he has the right to know of these investigations into his associates and political allies, as well as his own campaign. Is he saying he has the right to know that if further work was done, he might become more than just a witness?

Does the President seriously want to defend the principles that he should not only receive tipoffs, but he should also have the right to get the information to his private attorneys in order to prepare his and his wife's defense if needed?

What other individual in America could get this special treatment? Who else would dare claim that meetings in which tipoffs of confidential information about an investigation into a business partner, political ally, to his own campaign, to his wife's law practice should be protected from investigation? I hope that he was not serious if this is the principle he wishes to defend.

I think there are principles the President should be standing up for. No. 1, breach of the public trust is as serious an offense as committing a crime. No. 2, in exchange for the powers and responsibilities given the Government, the people expect fairness, evenhanded justice, impartiality, and they hold the basic belief that those in power can be trusted to be good stewards of their power. No. 3, They do not expect those in power to give themselves special treatment, tipoffs or the ability to hide documents.

Congress must also believe that those in high positions of responsibility are telling us the truth. When we ask questions or make inquiries, we trust the administration will tell the truth, will be honest, and when we get an answer, it is a full and complete one.

Unfortunately, throughout this Whitewater investigation, beginning with questions we asked in the Banking Committee in February of 1994, it appears that a guiding principle for some has been that the ends justify the means. The ends, as outlined in the memo from my good friend James Hamilton to the President, was you should not provide anything; make sure you do not give them too much information; keep your head down; do not let anything out.

I am afraid that this tone is apparently set from the top; that somehow that the public's best interest is served if the private interests of the President and First Lady are served, whether that be their political interest, the interest of the Presidency or even their commercial activities prior to the time they became the President and First Lady.

As I have said many times before, this ethical blurry, coupled with a set of standards that seem to imply if you are not indicted, you are fit to serve, has caused several administration officials to resign and continues to hound this administration still today.

To my colleagues in the Senate, I urge that we move forward with the subpoena. We need to get the full details of what was given to the private attorneys by the Government attorneys and what I think may have been a gross violation of public trust, if not more.

I commend the chairman for his dogged pursuit, his evenhanded manner in affording all sides an opportunity to be heard, and I urge my colleagues to support the committee on this request.

I yield the floor.

Mr. BAUCUS. Mr. President, earlier this year, I joined an almost unanimous Senate in voting to support a broad resolution creating a special committee to investigate the Whitewater matter. I believe this investigation must be both vigorous and fair.

First and foremost, it is our responsibility to find the facts and the truth. That is what people want. But, as we look for the truth, we must do everything possible to be fair and to respect the rights of everyone involved.

So I believe there are two fundamental questions that must be answered in deciding whether to seek this subpoena:

First, is the subject matter of this subpoena necessary to find the truth in the Whitewater matter?

And, second, is this subpoena being sought with respect for the fundamental rights of those involved? Or is it being sought in order to carry on a political fishing expedition?

The material sought by the special committee are the notes of Mr. William Kennedy from a meeting of the President's personal and official lawyers at a private law office on November 5, 1993. It is important to note that Mr. Kennedy, although an Associate White House Counsel at the time this meeting took place, had represented President Clinton before he was elected to the White House.

The special committee has determined that Mr. Kennedy's notes of this meeting are a necessary part of their investigation; they are necessary to help get at the truth. I respect that. I believe Mr. Kennedy's notes should be made available to the special committee and to Mr. Kenneth Starr, the Independent Counsel investigating Whitewater. And I am pleased that the President has consented to the release of these notes.

That should be the end of the story. This issue should be resolved. Mr. Kennedy's notes should be released without anybody having to go to court. That seems to be enough to satisfy the Independent Counsel, Mr. Starr, a Republican. That is enough to satisfy the distinguished chairman of the committee, Senator D'AMATO, also a Republican. But it does not seem to be enough to satisfy Speaker GINGRICH and the Republicans in the House of Representatives.

They appear to want more than Mr. Kennedy's notes. They also appear to want the President to surrender one of his fundamental rights, the right of attorney-client privilege. Whether a Republican or a Democrat occupies the White House, that President should enjoy the same rights as any other American. And that includes the right to communicate in confidence with his attorney, doctor, or minister.

This is not, as some have said today, a question of hiding the facts. Instead, it is a question of protecting a fundamental right—the fundamental right to talk candidly with your lawyer, your doctor, or your minister without having your words used against you. I do not care if we are talking about the President of the United States or the most average of Americans, that is one of the things—one of the values, one of the liberties—that make this country special.

To me, it is that simple. If the President is willing to authorize the release of Mr. Kennedy's notes—as he is—there is no reason to go to court. There is no reason to challenge the President's right to maintain the confidentiality of his communication with his legal counsel.

For these reasons, I will oppose the resolution before us today.

Mr. President, it is with great pride that I note an act of kindness and selflessness by Ashley Silvernell from Forsyth, MT.

Ashley was walking down the street a few days ago when she spotted a $100 bill in front of Eagle Hardware store. Now, $100 means a lot to anybody, but to someone in middle school it's a pot of gold. Without hesitation, however, Ashley turned the $100 in to the store manager, Ken Allison. Ashley asked for no reward.

It turns out that just a few days earlier, a family from Wyoming was shopping in the store that day and accidentally dropped the money. They didn't have credit cards. The family later called Mr. Allison from Wyoming, but never dreamed that the money would be found. When Ashley turned the $100 bill in, as you can imagine the family was thrilled.

Ashley's act should recall for this U.S. Senate what the holidays are all about. As we are knotted here in gridlock, 5 days before Christmas, we must remember that honesty and good judgment are qualities to strive for everyday of our lives. Ashley's good will is an inspiration to us all and must not go unnoticed.

And on behalf of myself and the thousands of Montanans who certainly will be inspired by her story, I would like to thank Ashley Silvernell for making a difference.

Thank you. And I yield the floor.

Mr. ABRAHAM. Mr. President, I rise in support of Senate Resolution 199. I would like to focus on this from a slightly different perspective from those that have been suggested so far. In particular, I would like this body to consider the following question: Has President Clinton, in withholding material Congress is seeking for an obviously legitimate purpose, acted consistently with the standard of conduct set by every President who has served since President Nixon?

Regrettably, Mr. President, I conclude that he has not. Accordingly, I believe it is incumbent on the Senate to adopt the pending resolution.

President Nixon's assertion of executive privilege precipitated a constitutional crisis that ultimately played a major role in forcing his resignation. Since that time, Presidents have been extremely cautious in using privilege as a basis for withholding materials from legitimate Congressional inquiries. They have been especially cautious when this withholding of information might suggest to a reasonable person that privilege might be being asserted to cloak Presidential or other high level wrongdoing.

The reason for this caution is clear: relations between the branches and the people's confidence in their Government suffer greatly when the President gives the appearance of withholding information in order to protect himself or others close to him from public scrutiny of potential wrongdoing.

This practice was codified in a directive from President Reagan issued on November 4, 1982. Addressed to all general counsels, the directive describes how President Reagan wanted the assertion of executive privilege handled.

Mr. President, I ask unanimous consent that the text of the memorandum be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1.)

Mr. ABRAHAM. Mr. President, let me quote from the memorandum:

> The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch.
>
> While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary.
>
> Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.* * *

To this end President Reagan set up prudential limitations regarding the assertion of privilege even where a claim might be legitimate:

> Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege.
>
> A substantial question of executive privilege exists if disclosure of the information requested might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or other aspects of the performance of the Executive Branch's constitutional duties.
>
> Every effort shall be made to comply with the Congressional request in a manner consistent with the legitimate needs of the Executive Branch.
>
> The Department Head, the Attorney General and the Counsel to the President may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the requested information.

Similarly, those advising Presidents since President Nixon have universally recommended great caution before assertions of privilege are made. One particular aspect of this advice is well worth quoting:

> An additional limitation on the assertion of executive privilege is that privilege should not be invoked to conceal evidence of wrongdoing or criminality on the part of executive officers.
>
> The documents must therefore be reviewed for any evidence of misconduct which would render the assertion of privilege inappropriate.
>
> It should always be remembered that even the most carefully administered department or agency may have made a mistake or failed to discover a wrongdoing committed inside or outside the Government. Study, Congressional Inquiries Concerning the Decisionmaking Process and Documents of the Executive Branch: 1953–1960.
>
> The greatest danger attending any assertion of Executive Privilege has always arisen from the difficulty, perhaps impossibility, of establishing with absolute certainty that no mistake or wrongdoing will subsequently come to light which lends credence to congressional assertions that the privilege has been improperly invoked.''

This passage comes from a 1984 opinion written by Robert B. Shanks, Deputy Assistant Attorney General for the Office of Legal Counsel.

Mr. Shanks was responding to the Deputy Attorney General's request for an opinion regarding Congressional subpoenas of Department of Justice Investigate Files. His opinion can be found at 8 Op. OLC 252. It well summarizes, I think, the dangers that any assertion of privilege may present even where the assertion is undertaken for legitimate reasons, but where its bona fide is bound to be suspect.

Now I recognize, Mr. President, that the principal label President Clinton is placing on this privilege claim is attorney-client—although he has not disavowed a claim of executive privilege.

But even apart from the fact that it is unclear whether the President has a separate attorney-client privilege in communications with government lawyers apart from his executive privilege, it does not seem to me that the label should matter. In either case the need to protect the President's authority to assert privilege where he really needs to, and to prevent gratuitous undermining of the public's faith in its government present the same overwhelming arguments for caution.

Now it is clear to me that no matter what the basis of the President's assertion of privilege here, it does not meet the standards that previous Presidents have followed in these matters.

The meeting at issue was apparently about a matter so far from the core interests of the Presidency that it required the involvement of private lawyers to defend the President's interests. It has nothing to do with national security. And it is impossible to believe that furnishing these notes will in any way impair the President in the performance of his constitutional functions.

Moreover, given that the President's associates have managed to force the appointment of an independent counsel by withholding and removing files relevant to the Department of Justice's investigation into Vincent Foster's death, it seems to me that the President should take his obligation of candor even more seriously than is ordinarily the case.

Thus, even if President Clinton has a valid claim of privilege—a point on which I am profoundly skeptical—I believe he ought not assert it here.

He has given no reasons weighty enough to justify its assertion.

And indeed, what he has said about this matter shows a surprising lack of perspective regarding the circumstances in which such assertions should be made.

President Clinton is quoted in the press as saying that he ''doesn't think he should be the first President in history'' not to protect communications arguably protected by the attorney-client privilege. I don't know if this statement was accurately reported, but if it

was, frankly it is as peculiar as some of the other claims that the President has been making in the last few weeks.

Without going back very far in history at all, we can all come up with examples where Presidents have waived possible attorney-client privilege claims in the face of congressional requests for information.

Indeed, if Congress is really and legitimately interested in something, such waivers are the norm, not the exception.

Let us look at the select committee's 1987 investigation of the Iran-Contra matter. The hearings, reports, and depositions are replete with references to notes, interviews, and testimony from government lawyers obviously covering potentially privileged materials. These include notes of then White House Counsel Peter Wallison, testimony from Attorney General Meese and Assistant Attorney General for the Office of Legal Counsel Charles Cooper, and National Security Council counsel Paul Thompson.

Similarly, when Congress became concerned about issues arising out of the United States relations with Iraq, President Bush provided numerous materials to various committees investigating these matters. And these materials could have been the subject of claims of attorney-client privilege at least as strong as the one President Clinton is making here.

Indeed, President Bush even provided notes and other materials relating to meetings among lawyers including the White House counsel and the counsel to the National Security Council regarding how to respond to congressional document requests. President Bush also interposed no bar to these lawyers' testifying before Congress and responding to questions.

Indeed, Mr. President, as recently as 2 days ago President Clinton's own White House counsel voluntarily provided to members of the Judiciary Committee an opinion of the Assistant Attorney General for the Office of Legal Counsel regarding his interpretation of an antinepotism statute as not limiting the President's appointment power.

This opinion undoubtedly would be subject to as strong an attorney-client privilege claim as one can imagine the President making. But the White House counsel provided it, knowing that it would waive any privilege claim, because he believed it was in the interest of the President for the Judiciary Committee to have it.

I ask unanimous consent that the letter transmitting this opinion be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

THE WHITE HOUSE,
Washington, December 18, 1995.

Hon. ORRIN HATCH,
Hon. JOE BIDEN,
U.S. Senate, Committee on the Judiciary, Washington, DC.

DEAR CHAIRMAN HATCH AND SENATOR BIDEN: At my request, Walter Dellinger has reexamined the question of the application of the anti-nepotism statute, 28 U.S.C. §458 to the President's nomination of William Fletcher to the Ninth Circuit Court of Appeals. I am forwarding to you Mr. Dellinger's memorandum which concludes that the section does not apply to the presidential appointment of federal judges.

His analysis of the text and its history confirms that the position of judge on a federal court is not an office or duty ''in any court'' within the meaning of section 458; that it was not considered to be so by the Congresses that enacted either the original or the current version of the section; and that it has never been treated as such by any subsequent President or Senate. The evident purpose of this statute was to prevent judges (and, as revised in 1911, person working for judges) from appointing their relatives to such positions as clerks, bailiffs, and the like. On the other hand, the novel view that section 458 applies to the nomination by the President of Article III judges would commit one to the conclusion that a number of distinguished judges had served their country illegally, including Augustus and Learned Hand.

Mr. Dellinger has also concluded that the statute does not apply to presidential appointment of judges because of the well-established ''clear statement'' rule that statutes will not be read to intrude on the President's responsibilities in matters assigned to him by the Constitution, including the appointments power, unless they expressly state that Congress intends to limit the President's authority. The Supreme Court has applied this principle often, even to statutes the text of which would otherwise clearly appear to cover the President.

Any assumption that section 458 limits the President's authority to appoint Article III judges—and that such a limitation would not raise any serious constitutional question—would establish a precedent that would profoundly alter the constitutional separation of powers in ways that sweep well beyond the statute at issue here. Any assumption that general statutory language should be read to limit the authority of the President of the United States to carry out his constitutional responsibilities would overturn important executive branch legal determinations by a succession of Assistant Attorneys General including William H. Rehnquist, Theodore B. Olsen, Charles J. Cooper and William Barr and by Deputy Attorney General Lawrence Silberman, in addition to clearly applicable Supreme Court decisions.

In light of its text, its statutory history, and the constitutional principle embodied in the clear statement rule, it is beyond doubt that any court would find section 458 to be inapplicable to the presidential appointment of federal judges. I hope that the Senate will not base its important decision regarding the nomination of Mr. Fletcher on the view that section 458 applies to it.

Many thanks for your consideration.

Sincerely,

JACK QUINN,
Counsel to the President.

Mr. ABRAHAM. In short, there is nothing extraordinary or unprecedented in the Select Committee's interest in these notes and the committee's desire to get them is far from extraordinary or unprecedented in the history of Congressional-Presidential relations.

Rather, what is extraordinary and inconsistent with the way Presidents since President Nixon have handled such questions is President Clinton's assertion of privilege.

This is particularly striking given the circumstances surrounding these materials; circumstances suggesting to many reasonable observers, including the editorialists quoted on the floor today, that there is a issue of potential high level wrongdoing at issue here.

Mr. President, I would like to make one final point. Some have said that if we vote to enforce the subpoena, all efforts to reach a negotiated settlement of this matter will cease.

Mr. President, that would greatly surprise me. The courts have stated time and time again that both branches have an obligation to accommodate each other's interests in these matters. Thus, if either branch were to cease all efforts at accommodation, it would do great damage to its legal case. Moreover, it is in both branches' interest, and indeed it is both branches' constitutional duty, to try to resolve this matter without going to court.

Therefore I do not think any Member of this body should view a vote to enforce this resolution as a vote to end our efforts at resolving this matter without going to court.

Rather, even if we adopt this resolution and Senate Legal Counsel begins work on legal papers, I am sure the committee will at the same time continue its efforts to obtain these notes with the President's consent. And it is my hope that, resolution or no resolution, the President will provide them promptly.

That is his duty, as it is our duty to defend the committee's ability to investigate potential wrongdoing.

I yield the floor.

EXHIBIT 1

THE WHITE HOUSE
Washington, November 4, 1982.

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

Subject: Procedures Governing Responses to Congressional Requests for Information

The policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. While this Administration, like its predecessors, has an obligation to protect the confidentiality of some communications, executive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary. Historically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches. To ensure that every reasonable accommodation is made to the needs of Congress, executive privilege shall not be invoked without specific Presidential authorization.

The Supreme Court has held that the Executive Branch may occasionally find it necessary and proper to preserve the confidentiality of national security secrets, deliberative communications that form a part of the decision-making process, or other information important to the discharge of the Executive Branch's constitutional responsibilities. Legitimate and appropriate claims of

privilege should not thoughtlessly be waived. However, to ensure that this Administration acts responsibly and consistently in the exercise of its duties, with due regard for the responsibilities and prerogatives of Congress, the following procedures shall be followed whenever Congressional requests for information raise concerns regarding the confidentiality of the information sought:

1. Congressional requests for information shall be complied with as promptly and as fully as possible, unless it is determined that compliance raises a substantial question of executive privilege. A ''substantial question of executive privilege'' exists if disclosure of the information requested might significantly impair the national security (including the conduct of foreign relations), the deliberative processes of the Executive Branch or other aspects of the performance of the Executive Branch's constitutional duties.

2. If the head of an executive department or agency (''Department Head'') believes, after consultation with department counsel, that compliance with a Congressional request for information raises a substantial question of executive privilege, he shall promptly notify and consult with the Attorney General through the Assistant Attorney General for the Office of Legal Counsel, and shall also promptly notify and consult with the Counsel to the President. If the information requested of a department or agency derives in whole or in part from information received from another department or agency, the latter entity shall also be consulted as to whether disclosure of the information raises a substantial question of executive privilege.

3. Every effort shall be made to comply with the Congressional request in a manner consistent with the legitimate needs of the Executive Branch. The Department Head, the Attorney General and the Counsel to the President may, in the exercise of their discretion in the circumstances, determine that executive privilege shall not be invoked and release the requested information.

4. If the Department Head, the Attorney General or the Counsel to the President believes, after consultation, that the circumstances justify invocation of executive privilege, the issue shall be presented to the President by the Counsel to the President, who will advise the Department Head and the Attorney General of the President's decision.

5. Pending a final Presidential decision on the matter, the Department Head shall request the Congressional body to hold its request for the information in abeyance. The Department Head shall expressly indicate that the purpose of this request is to protect the privilege pending a Presidential decision, and that the request itself does not constitute a claim of privilege.

6. If the President decides to invoke executive privilege, the Department Head shall advise the requesting Congressional body that the claim of executive privilege is being made with the specific approval of the President.

Any questions concerning these procedures or related matters should be addressed to the Attorney General, through the Assistant Attorney General for the Office of Legal Counsel, and to the Counsel to the President.

RONALD REAGAN.

Mr. BYRD. Mr. President, on a day when some 260,000 federal employees remain idle because the Congress has not completed work on the annual appropriations bills—its most fundamental constitutional task—this body has before it a measure dealing with Whitewater that is unwise, and, quite frankly, wholly unnecessary. Instead of acting on the remaining appropriations bills, instead of completing our most basic task, we are being asked to divert our attention and adopt a resolution which is, I believe, nothing more than a vehicle to promote the political fortunes of some.

The special committee, which the Senate created to investigate the Whitewater matter, has held more than a month of hearings. They have heard testimony from more than 150 witnesses. The White House, in conjunction with these hearings, has produced more than 15,000 pages of material, while the law firm of Williams and Connolly, which represents the President and Mrs. Clinton, have produced an additional 28,000 pages. And through it all, the American taxpayer has been billed more than $27 million dollars.

Yet, despite this, the American people are being led to believe that, unless the Senate adopts this resolution, which would require the Senate Legal Counsel to go into federal court in an attempt to enforce a Senate subpoena, some facet of the investigation will go uncovered. Mr. President, nothing could be further from the truth.

The fact is that the White House has already stated its willingness to supply the material the Senate has asked for. The President has said he will make available the documents in question; notes taken by a former White House attorney during a November 1993 meeting. He has, as I think these actions show, acted in a reasonable, good faith manner. But at the same time the President has been willing to produce the subpoenaed material, he has also asked that he not lose the fundamental privilege of attorney-client confidentiality.

Mr. President, every American has the right to talk to a lawyer fully and frankly without fear that the government will compel the disclosure of these personal communications. The President of the United States, be he Democrat or be he Republican, is no different. He is, like every other American citizen, entitled to the benefits of the attorney-client privilege.

In view of the President's offer of cooperation, the Committee's attempt, to invade the relationship between the President and his private counsel smacks of an effort to force a claim of privilege by the President, who must assert that right to avoid risking the loss, in all forums, of his confidential relationship with his lawyer. This effort, at this time, and in light of the President's willingness to comply with the Senate's subpoena, simply smacks of political partisanship.

Why else, if not simply to score political points, would the majority reject the President's offer? Why not accept the material, which the majority says it needs, and get on with the investigation? Why go to court, an action that will only prolong the investigation, if there is no intent to simply win headlines and seek political advantage?

Mr. President, I hope my colleagues who may be inclined to support this resolution will reconsider their position. I hope they will reexamine the road down which we may be traveling, and vote against the subpoena resolution.

Mr. SPECTER addressed the Chair.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. D'AMATO. Mr. President, if I might seek recognition, first, for the purposes of propounding a unanimous-consent agreement.

Mr. SPECTER. I will consent with the understanding that I do not lose my right to the floor after the unanimous-consent agreement is propounded.

Mr. SARBANES. We imagine it will include the Senator within it.

UNANIMOUS-CONSENT AGREEMENT

Mr. D'AMATO. Absolutely. First of all, I thank the ranking member, Senator SARBANES, as well as Senator PRYOR, for giving Senator SPECTER an opportunity to proceed. He is going to use about 10 minutes. Thereafter, I ask unanimous consent that Senator PRYOR be recognized following Senator SPECTER.

The PRESIDING OFFICER. Without objection, it is so ordered.

The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, I support the pending resolution, but I express at the outset my concern about some of the legal arguments which have been raised that the attorney-client privilege does not apply to Congress, to congressional investigations. It is not necessary for me to reach that issue in my own conclusion or judgment here, that the attorney-client privilege does not apply, but I do express that concern.

There has been an argument raised that the attorney-client privilege is different from the privilege against self-incrimination because the privilege against self-incrimination has a constitutional base. In my view, however, there is a constitutional nexus to the attorney-client privilege which arises from the constitutional right to counsel. Since the citations of authority limiting the attorney-client privilege in the context of congressional investigations—since those cases were handed down, there has been a considerable expansion in constitutional law on the right to counsel—Gideon versus Wainright, in 1963, asserting that anybody was entitled to counsel if they were haled into court on a felony charge, whereas, the practice in the prior period had been that the right to counsel did not apply, and the expansion of warnings and waivers under Miranda versus Arizona. So I think the breadth of the conclusion that the attorney-client privilege is not constitutional is certainly entitled to some skepticism at the present time.

It is my view, however, that the attorney-client privilege does not apply here to preclude enforcement of this subpoena because the attorney-client privilege simply, on the facts, does not

apply. Upjohn versus United States contains the basic proposition that the attorney-client privilege is the oldest of the privileges for confidential communications known to the law, with the citation to Wigmore. The Supreme Court in the Upjohn case says that the purpose of the attorney-client privilege is to encourage full and frank communications between attorneys and their clients and thereby promote the broader public interest in the observance of law and the administration of justice. The privilege recognizes that sound legal advice and advocacy serve public ends, but such advice or advocacy depends upon lawyers being fully informed by their clients.

In the Westinghouse versus Republic of the Philippines case, the Third Circuit articulated this view: ''Full and frank communication is not an end in itself, but merely a means to achieve the ultimate purpose of privilege, promoting broader public interest in the observance of law and the administration of justice.''

The Third Circuit, in the Westinghouse case, goes on to point out, ''because the attorney-client privilege obstructs the truth-finding process, it is narrowly construed.''

The essential ingredients for the attorney-client privilege were set forth in United States versus United Shoe Machinery Corp., a landmark decision by Judge Wyzanski, pointing out that one of the essentials for the privilege is that the communication has to have a connection with the functioning of the lawyer in the lawyer-client relationship. Professor Wigmore articulates the same basic requirement.

As I take a look at the facts present here and a number of the individuals present, there was not the attorney-client relationship. There were present at the meeting in issue David Kendall, a partner at the Washington, DC, law firm of Williams & Connolly, recently retained as private counsel to the President and Mrs. Clinton. That status would certainly invoke the attorney-client privilege. Steven Engstrom, a partner of the Little Rock law firm that had provided private personal counseling in the past. That certainly would support the attorney-client privilege. James Lyons, a lawyer in private practice in Colorado, who had provided advice to the President when he was Governor, and to Mrs. Clinton at the same time. But then, also present, were Bruce Lindsey, then director of White House personnel, who had testified that he had not provided advice to the President regarding Whitewater matters. Once parties are present who were not in an attorney relationship, the attorney-client privilege does not continue to exist in that context, where they are privy to the information. There was Mr. Kennedy, himself, associate counsel to the President—William Kennedy, who said he was ''not at the meeting representing anyone.'' Then you had the presence of then counsel to the President, Mr. Bernard Nussbaum, and also associate counsel to the President, Mr. Neal Eggleston, who were present, not really functioning in a capacity as counsel to the President or Mrs. Clinton.

So, as a legal matter, when those individuals are present, the information which is transmitted is not protected by the attorney-client privilege. And then you have, further, the disclosure which was made by White House spokesman, Mark Fabiani, to the news media characterizing what happened at the November 5 meeting, and discussing the subject matter of the meeting, which would constitute as a legal matter, in my judgment, a waiver of the privilege.

So that recognizing the importance of the attorney-client privilege, I would be reluctant to see this matter decided on the basis that Congress has such broad investigating powers that the attorney-client privilege would not be respected. As I say, we do not have to reach that issue. On the facts here, people were present who were not attorneys for the President or Mrs. Clinton. Therefore, what is said there is not protected by the attorney-client privilege. The later disclosure by the White House spokesman, I think, would also constitute a waiver. For these reasons, and on somewhat narrower grounds, it is my view that the resolution ought to be adopted and the subpoena ought to be enforced.

I yield the floor.

The PRESIDING OFFICER. Under the previous order, the Senator from Arkansas is recognized.

ACCOLADES TO SENATOR BYRD

Mr. PRYOR. Mr. President, I thank the Chair for recognizing me.

Mr. President, first, I want to add my accolades, if I might, for just a moment, to the very distinguished senior Senator from West Virginia, ROBERT BYRD, who earlier this afternoon, I think probably gave one of the more classic speeches that has been given on this floor for many a year.

I hope the result of that will be that this Senate makes a video tape of this particular speech available—and certainly the CONGRESSIONAL RECORD—and that it would be widely disbursed, and that, hopefully, each incoming Senate class in years to come in this great institution would have the privilege, during the orientation period, of listening to the wise and truthful and very strong words of Senator ROBERT C. BYRD——about the institution that he loves and that we love and respect. I applaud him for his statement. I think it was timely. I think it was on the point. I think all of us owe him a deep debt of gratitude for that statement which was given from Senator BYRD's heart.

DIRECTING THE SENATE LEGAL COUNSEL TO BRING A CIVIL ACTION

The Senate continued consideration of the resolution.

The PRESIDING OFFICER (Mr. Faircloth). The Senator from Arkansas.

Mr. PRYOR. Mr. President, here we are, almost the night before Christmas, in the U.S. Senate, the House of Representatives, and we find ourselves still in session. We do not find ourselves, tonight, ironically, talking about what to do about the budget impasse. We do not find ourselves on the floor of the U.S. Senate this evening talking among each other and colleagues as we should about how to reopen the Government.

No, Mr. President, we find ourselves this evening talking about a more arcane and mundane situation, something called Whitewater. Whitewater has become the fixation of one of our political parties. There is no secret about that.

Today, the Republicans control the Congress. They set the agenda for what committees meet, when they meet, what issues come before those committees, what issues are brought before the floor of the U.S. Senate. I think it very timely, Mr. President, for us to examine the priorities of this session of Congress.

I think it very interesting to note that tonight, a few hours before Christmas, when we had hoped to be back in our home States or wherever we might have been, when all of the employees of the Federal Government who are furloughed would prefer to be working and serving the public, as they do so well, we find ourselves once again engaged in what I call the Whitewater fixation.

Here are the priorities that are established not by this Senator, not by this side of the aisle, but by our colleagues who might be well meaning on the other side of the aisle. I think it bears listening to for a few moments, Mr. President, to see that in this year we have had some 34 hearings relating to Whitewater. That would be the red bar going up the chart. Thirty-four hearings in 34 days of the U.S. Senate that have been designated for Whitewater—the Whitewater fixation.

How many days have been set aside for Medicaid funding? Mr. President, six hearings, Mr. President—six compared to 34 for the Whitewater fixation.

How many hearings have we held in the U.S. Senate in the calendar year 1995, in this session of Congress, that relate to education funding, Mr. President? Four hearings—four hearings compared to 34 hearings of Whitewater.

And how many hearings, Mr. President, have we had on the Medicare plan, as proposed by the majority party? How many days of hearings have we heard about Medicare? One day, one hearing. There it is, the small green bar on the bottom of the chart.

That tells the story, Mr. President, I think of priorities for 1995 and this session of Congress, where the priorities